No. 11,402

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAUL SAMUEL, WALTER SAMUEL, SAM BROWN and MURRAY SCHUTZ,	*Appellants,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

CLOSING BRIEF FOR APPELLANT, MURRAY SCHUTZ.

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Before answering the specific points argued in appellee's brief, we deem it important to generally discuss the manner in which appellee has briefed its position, calling particular attention to factual inaccuracies, unjustified inferences and important omissions contained therein.

Appellee has predicated its entire position on a false premise; by assuming there was competent proof of a conspiracy it seeks to justify everything that took place in the trial Court on this false assumption, entirely ignoring the fact that the conspiracy had to be established by competent testimony before any of

the acts and declarations of appellant Schutz' co-defendants could be resorted to as evidence against Schutz. Furthermore, appellee has discussed the case as an entity and has failed to consider either the admissibility of evidence or the sufficiency thereof as applicable to Mr. Schutz, irrespective of what probative value such evidence may have as to the other appellants. The guilt or innocence of Mr. Schutz is a matter personal to him and has to be considered separate and apart from the guilt or innocence of the other appellants. (*Kotteakos v. United States,* 328 U. S. 750, 772.)

At the very opening of its brief, appellee sets forth what it has pleased to term "The Scheme" and predicates this scheme on a misstatement of fact by alleging that "Walter Samuel purchased from Murray Schutz, a wholesale liquor dealer, 1850 cases of Old Marshall Straight Rye Whiskey. This sale was financed by the Morris Plan Company and was evidenced by a receipted invoice of the Distiller Distributing Company." The record does not support this statement and appellee has ignored the evidence on this point. The evidence established that the Morris Plan Company paid Schutz for only 1275 cases and no more; that although an invoice for 1850 cases was originally delivered by Schutz, the Morris Plan Company gave him back releases for 575 cases. This matter, with full references to the record, is set forth on pages 102 to 104 of Schutz' Opening Brief. The entire argument of appellee is based on the sale of 1850 cases to Samuel, a thing that never occurred.

Next, appellee contends that "The Scheme" involved the issuing of invoices by Schutz "showing sales by the Distillers Distributing Company to these tavern owners, although the tavern owners had no dealing whatever with the Distillers Distributing Company, or with Schutz personally". Here appellee has entirely overlooked the fact that Schutz understood and believed that the invoices were being issued to those who had made up the pool of original buyers and to those who subsequently placed orders through Saul Samuel. (See Schutz' Opening Brief, pp. 102 to 108.)

Appellee, by ignoring the matter, concedes the fact to be that Schutz never received more than $25.77 per case, no matter what amount the Samuels, Brown or Hoffman received.

Nowhere does appellee contend that Schutz ever had knowledge that the Samuels or Brown were asking or receiving any amount in excess of $25.77 per case for the whiskey or reselling the same, as distinguished from the procuring of original orders from the tavern owners.

GROUNDS FOR REVERSAL URGED BY SCHUTZ THAT REMAIN UNANSWERED BY APPELLEE.

Appellant Schutz has raised many grounds for the reversal of the judgment as to him. Appellee has failed to either answer or comment on the following:

(a) **Error of the Court in admitting in evidence against Schutz Government's Exhibits 8 and 24 and**

the testimony of the witness Jane Coulter relative thereto. (Schutz' Opening Brief, p. 117.)

These exhibits and the testimony related to the payment of the special tax and penalties by Walter Samuel in 1946, for doing a wholesale liquor business in 1943.

The importance of this evidence is stressed on page 35 of appellee's brief wherein it is stated:

> "The appellant Walter Samuel's admission that he carried on the business of a wholesaler is evidenced by his wholesale liquor dealer's tax payment in 1946, two and one-half years after the sales were made (U. S. Exhibits 8 and 24). This tax payment was made for a period covering the dates of the disposition of the Old Marshall Straight Rye Whiskey. **If the record were otherwise bare as to Walter Samuel, this would be a sufficient acknowledgment of his participation in the conspiracy.**"

The foregoing is the identical argument counsel for Schutz told the trial Court would be made by the Government if the exhibits were admitted against Schutz. (See R. 421e and 421h; Schutz' Opening Brief, p. 119.)

True, appellee argues this matter only as bearing on the guilt of Walter Samuel, but the evidence was admitted against Schutz and was used to establish the unlawful acts of Samuel and as evidence against Schutz.

The failure of the Government to answer this point is the best evidence that there is no answer and that

the admission of the exhibits and testimony against Schutz was prejudicial error.

(b) **The Court erred in refusing to give Schutz' Requested Instruction No. 23** (Schutz' Opening Brief, p. 121), to the effect that the conspiracy must be established as to Schutz by evidence independent of that of the acts and declarations of his alleged co-conspirators.

Appellee consistently resorts to the testimony relating to acts and declarations of Brown and Saul Samuel, made out of the presence of Schutz, as being evidence sufficient to establish the conspiracy as to Schutz. Such is not the law. In our opening brief we have cited many cases announcing the foregoing principle. Appellee's failure to comment on this matter justifies the inference that the point could not be answered.

Appellee cites *Sugarman v. United States,* 35 Fed. (2d) 633, as authority for the proposition that the acts and declarations of an alleged co-conspirator in furtherance of the conspiracy are binding upon a co-conspirator, but overlooks the fact that such rule only applies where there is evidence establishing the conspiracy independent of such acts and declarations. (See cases cited and quoted from on pp. 109-110 of our Opening Brief.)

(c) **The Court erred in refusing to give Schutz' Requested Instruction No. 25** (Schutz' Opening Brief, p. 127), to the effect that his guilt or innocence must be determined upon his honest belief of what the facts

and circumstances were in 1943 and not what the evidence at the trial in 1946 established the conditions to be in 1943.

It was for the jury to determine whether Schutz' actions were prompted by an improper and illegal motive or whether he acted innocently and in good faith. This function the jury should have performed under appropriate guidance from the Court. (*Bollenbach v. United States,* 326 U. S. 607.) The refusal of the Court to give this instruction, so necessary to Schutz' defense, is reversible error, and the Government's failure to even attempt to justify such action is tantamount to a confession of error.

(d) **The Court erred in denying Schutz' motion for a Bill of Particulars.** (Schutz' Opening Brief, p. 131.) By this motion appellant sought information as to the exact nature of the conspiracy for which he was on trial. He asked to be informed whether he was charged with conspiracy to sell whiskey above the wholesale ceiling price or the retail ceiling price. He also asked information as to just what the ceiling price was. The record establishes that it was not until the Court actually charged the jury that any one had any information on these points and even then, as hereinafter pointed out in dealing with the Court's instructions as to the ceiling price, it practically stands admitted by the Government that the formula and figure establishing the ceiling price, as given to the jury by the Court, was erroneous.

No man should be placed on trial or allowed to be convicted where he is forced to trial in the dark as to a material and essential element of the charge.

Each of the foregoing matters were of vital importance during the trial and the error appearing in each thereof is sufficient to justify a reversal of appellant's conviction. If the points were not well taken, it would seem that the Government would have had no difficulty in answering them but, by failing to answer these points, the Government's action can be construed in no other light than that it was unable to answer.

INSUFFICIENCY OF THE EVIDENCE TO ESTABLISH THE CHARGE AS TO APPELLANT SCHUTZ.

The Government divides its argument as to the sufficiency of the evidence into two parts, dealing first with the sufficiency of proof as to a conspiracy to violate the tax and basic permit statutes and then as to the sufficiency of the evidence to establish a conspiracy to sell liquor above the ceiling price.

Dealing with the first portion of the argument, the Government states that there were many transactions whereby Saul Samuel and Sam Brown sold liquor in wholesale lots to various tavern owners and that neither of these persons had paid the special tax or procured the basic permits so to do. The evidence

shows that Schutz had paid the special tax and had procured the basic permit, all covering the times involved in the indictment. Schutz' guilt can not be established merely by proving the guilt of the Samuels and Brown, there must be more in the record and, in order to supply this additional evidence, the Government resorts to the following line of reasoning: Thus, on page 35, the Government alleges that these sales were not independent transactions because Samuel and Brown had bought the whiskey from Schutz and again the Government refers to the purchase of 1850 cases. The sale of the whiskey through the Morris Plan Company involved only 1275 cases, and the Government only proved the sale of 670 cases to the tavern owners. Whether these sales were made out of the 1275 cases or out of the 695 cases the title to which remained in Schutz does not appear in the evidence and is not argued in the Government's brief. The evidence at no point establishes that Schutz knew of the activities of Samuel and Brown. Schutz' testimony is that at all times he believed he was selling his own whiskey and that he believed he was issuing invoices to purchasers of whiskey from Schutz. There is nothing in the record to refute this testimony.

The Government alleges that Schutz reported the sales of his 52B records "as sales of the Distillers Distributing Company". If they were in fact sales of the Distillers Distributing Company, then there could be no conspiracy to violate the tax and permit statutes.

On page 37 the Government alleges that the only other explanation of these transactions "which would vest them with a legitimate use of Schutz' license is the theory that Schutz was selling to a group of retailers". The Government then alleges that this hypothesis is inconsistent with Mrs. Theo McNett's testimony as to the conversation had with Schutz and that she stated that she did not have the impression that Schutz had told her that Samuel and others were buying the whiskey. Mrs. McNett's testimony in this regard appears on page 204 of the record and in addition to her stating that she did not have an impression that Schutz had so told him, she testified "but I would not say that he didn't, except that I don't remember of him saying that". It should be remembered that Mrs. McNett had only been an employee of Schutz from August 15, 1943, just 15 days during the month the transactions took place.

The Government points out that Mrs. McNett testified that the billing—the issuance of the invoices—was done by the Distillers Distributing Company because Mr. Samuel could not issue the bills himself and that Schutz had told her he was to issue the invoices because Samuel had a retail store and could not issue the bills himself. Assuming that the testimony of Mrs. McNett is true, it does not establish Schutz' connection with the conspiracy charged. Samuel could not issue any invoices for wholesale lots of liquor and Schutz' assertion in this regard does not establish that Schutz was helping him so to do. Schutz at all times not only believed he was selling but actually

was selling his own liquor and the Government never proved to the contrary.

The Government, on page 37, alleges as follows:

> "The only evidence in the record which supports the group-purchase theory is the self serving assertion of the appellant Schutz himself that Sanders said he thought he could get a group of retailers together to take the entire purchases (Tr. 434). Not only is this flatly denied by Sanders himself (Tr. 592, 593), but it is a wishful hypothesis which finds no comfort in the testimony of Baker, who financed the purchase, Saul Samuel, Sam Brown, or Walter Samuel, the co-appellants, or Theo McNett, Schutz' bookkeeper. Finally, it is refuted by the most convincing of external circumstances; not a single one of the purchasers themselves mentioned anywhere in the testimony in this record any such plan or arrangement."

The foregoing statement does not conform to the record. The jury did not have to believe Sanders' denials. A reading of the testimony given by Sanders together with his activities in the Samuel liquor store, coupled with the pencilled notation of figures, the exemplars written by Sanders and his refusal to deny his making the pencilled computations, would have and possibly did justify the jury in paying no attention to his testimony whatsoever.

The Government alleges that the group-purchase theory finds no support except in Schutz' own testimony and finds no support in the testimony of Baker, the Samuels, Brown, or the tavern owners. The testi-

mony of Brown (R. 506-7 and 518-519) is that they did not have sufficient money to make the entire purchase and went out and procured advance orders for some of the whiskey. Saul Samuel testified that he took orders from his customers for some of the whiskey and that he knew that Mr. Brown was busy getting people to buy it (R. 586-7), and that he knew the money collected from his customers was to be used in paying the invoice price to Mr. Schutz. (R. 586.) The testimony of the tavern owners also inferentially supports the testimony of Mr. Schutz. Francis Duffy testified that he called Saul Samuel and asked if he could get any whiskey and Samuel replied "maybe" and that possibly there would be some whiskey coming through but he did not know for sure. (R. 233.) Emmitt Clay testified that he spoke to Mr. Hoffman and asked him if he could get some whiskey; that Hoffman was working for the wholesaler. (R. 248.) Charles Antonelli testified that in the conversation with Mr. Samuel relative to the whiskey, he was told that Samuel was going to get this liquor. (R. 323.) Lucille Tyler testified that she placed an order for the whiskey with Saul Samuel; that she understood the whiskey was coming from the Distillers Distributing Company and that she was buying it from that company (R. 333); that Samuel said he did not have the liquor himself; that it was available and that he could make arrangements for it. (R. 333.) This testimony shows that the sales being made to these tavern owners were in reality sales to be consummated in the future and the whiskey procured from a source of supply

other than the Samuels, Brown or Hoffman. While none of the tavern owners testified as to being informed that there was a stock of whiskey for the purchase of which the Samuels and Browns were attempting to get a group together, this is readily understandable when we consider that these parties were asking the tavern owners to pay an amount almost double the invoice price. This evidence does establish that, insofar as the purchase from Schutz is concerned, Saul Samuel and Brown were procuring tavern owners to pledge themselves in advance to the purchase of this whiskey and to make out checks to the Distillers Distributing Company for the invoice price thereof.

These were all matters that the jury had a right to consider as corroborative of the testimony of Schutz, a right denied the jury by the refusal of the Court to instruct that Schutz' honest understanding and belief as to such facts constituted a defense.

Next, the Government argues sufficiency of the evidence to support the charge of conspiracy to violate the Emergency Price Control Act. It is a remarkable fact that the Government admits that the alleged ceiling price of $25.77 a case was arrived at by use of the cost-plus-15% formula set forth in MPR 445, although this formula did not become operative until the 31st day of August, 1943, one day after all of the sales had been consummated. Nowhere in the record is there any proof of what this whiskey could legally be sold for in wholesale lots prior to August 31, 1943. The fact that Schutz, in fixing the price at which he

would sell the liquor, may have used the formula that was not to become operative until August 31st, does not establish at what price the liquor could lawfully be sold for during the period in question.

It follows that there never was any competent proof of an essential element of this portion of the charge. It can not be assumed that the price of $48.00 or $55.00 a case was in excess of the price established by law, which price was a matter that depended upon physical facts and figures, which may have varied in each particular case and had to be established by competent evidence. Later in this brief, in dealing with the Court's instructions, we will demonstrate that the formula relied on by the Government and as given to the jury by the Court was erroneous.

The Government points out that Samuel and Brown were receiving monies greatly in excess of the price at which Schutz was selling the whiskey but there is no testimony in the record that Schutz knew of this fact or was aiding and abetting the parties so to do. The only evidence in the record is that Schutz received the price he had fixed for the whiskey—$25.77 a case.

THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE CEILING PRICE.

The trial Court instructed the jury that the maximum selling price of the whiskey was the net cost to the wholesaler plus a 15% mark up (R. 667), and

adopted such formula from MPR 445. This is admitted by the Government on page 44 of its brief where the contentions of both parties are set forth as follows:

> "Maximum Price Regulation No. 445, 8 Fed. Reg. 11161, established a formula of cost plus 15% for the maximum price for a sale at wholesale of distilled spirits. The court instructed in accord with this regulation (Tr. 667). All the elements to establish the price were in evidence, the cost, the freight, and the tax (Tr. 471-473). * * * Appellants do not contend that no ceiling applied to the Old Marshall Straight Rye Whiskey, but only that the formula set forth in *Maximum Price Regulation 445* was not yet in effect at the time of the sales."

There was no other evidence in the record on which any maximum price could be figured or determined. If, as contended for by appellant and shown by the OPA Regulations, such formula was not in operation and not the proper one to be applied, **there was no evidence at all as to the maximum price for which the whiskey could be sold.**

We set forth in the appendix hereto the various OPA Regulations dealing with the subject in chronological order.

Under the express provisions of MPR 445, the provisions relative to the maximum prices at which wholesalers could sell distilled spirits did not become effective until August 31, 1943 and until that date the

provisions of MPR 193 and of the GMPR remained in full force and effect.

Neither MPR 193 nor the GMPR provided for any such formula fixing the maximum price for the sale of whiskey in wholesale lots.

Neither the appellant Schutz, nor Walter Samuel, was engaged as a wholesaler of whiskey during March, 1942.

MPR 193 expressly provides that the seller's maximum price for distilled spirits "shall be the seller's maximum price established under § 1499.2(a) of the General Maximum Price Regulation", plus certain additions and further provides that if the seller's maximum price can not be determined under paragraph (a), then his price shall be that established under paragraph (a) for the most closely competitive seller of the same class for such domestic distilled spirits or for a similar commodity most nearly like it.

The GMPR provided that the maximum price shall be either (a) the highest price charged by the seller during March, 1942, for the same commodity or for the similar commodity most nearly like it or (b) if the seller's maximum price could not be determined as aforesaid, then the highest price charged during March, 1942 by the most closely competitive seller of the same class for the same commodity.

It follows from the foregoing that, as all the sales were made prior to August 31, 1943 (despite the

government's contention to the contrary), we are thrown back to the General Maximum Price Regulation for the fixing of the ceiling price and this ceiling price could only be the highest price charged during March, 1942 by the most closely competitive seller of the same class for the same or a similar commodity. **There was absolutely no evidence establishing this latter factor. Therefore there was no evidence in the case establishing the ceiling price. This constituted a fatal failure of proof on the part of the government and rendered the instruction given by the Court erroneous and reversible error.**

The government relies on the decision of this Court in *Martini v. Porter*, 157 F. (2d) 35, but this case is in reality an authority for appellant. Thus on page 47, this Court says:

> "The sales herein were made during July and August, 1943. The General Maximum Price Regulation controls these sales. There are four sections under the GMPR providing methods for ascertaining maximum prices."

The foregoing language of this Court should dispose of this entire question. As MPR 445 did not apply, then the instruction given by the Court to the jury undoubtedly was erroneous.

In the *Martini* case, there had been an order made by the OPA fixing the ceiling price and the liquor involved was of such a character, as the evidence showed, that a maximum selling price could not be arrived at under the General Maximum Price Regu-

lation, except by an order made by the Price Administrator under section 1499.3(c). The order made by the Price Administrator recited "neither applicants nor any competitor sold the same or similar whiskey during March, 1942." The *Martini* case presents a situation totally at variance with the case at bar. The government offered no proof that the Marshall Whiskey or a similar commodity was not sold during March of 1942 and there was no proof offered that the price had been fixed under authorization of an order made by the Price Administrator. All presumptions are in favor of innocence and it can not be presumed that the maximum price could not be fixed under section 1499.2 of the GMPR.

Lastly, the government seeks to uphold the formula and the sufficiency of the evidence to establish the ceiling price by asserting that there was one sale made after August 30, 1942, viz.: the second sale to Picchi, and refers to pages 285 and 286 of the record. A reference to this testimony shows that Picchi states he made two purchases of the whiskey, the second one being "a month or so" after the first sale. The government assumes that the second sale took place a month or so after the issuance of a check by Picchi, payable to the Distributing Company for $644.25. In this the government is in error. The testimony of Mr. Picchi (R. 283) shows that he made two purchases, that the first purchase was all in cash (R. 284) and that the second purchase was made by a check payable to the Distributing Company. (R. 284.) The check, Government's Exhibit 34, was payable to the

Distillers Distributing Company and is dated August 23, 1943, and the invoice for such sale is stamped paid as of August 27, 1943. (R. 281.)

Mr. Parr, the accountant who kept Picchi's books, testified that the books showed both the cash and check payments to have been made in August of 1943. (R. 268-9, 288-9.) **Picchi's books were admitted in evidence** (U. S. Exhibit 37) **and show both payments made on August 23rd.**

It follows that the government's attempt to uphold the erroneous instruction, on the theory that one sale took place after August 30th, is without support in the record and this attempt on the part of the government demonstrates the error not only in the Court's instructions but in the very theory on which the government presented its case.

The record is replete with numerous sales having been made to various tavern owners. Does the government contend that the charge in the indictment can be supported by the proof of one sale made after August 30th? If so, it was error to admit evidence of all the other sales over the objection of appellant Schutz, but, as pointed out above, no sales were made after August 30th and there was a total failure of proof as to any violation of law in that there was no evidence establishing the maximum price beyond which the liquor could not be sold.

UPON THE RECORD, THE GOVERNMENT'S ATTEMPT TO RELY UPON PROOF OF A CONSPIRACY TO DO ANY ONE OF THE THREE THINGS CHARGED IN THE INDICTMENT CAN NOT BE SUSTAINED.

The indictment sets forth a conspiracy to violate three laws of the United States. The government contends that "even should this court find an insufficiency of proof as to one of the purposes of the conspiracy as charged, it would properly affirm the judgment below, provided that a conspiracy to commit one of these offenses was proved".

The Court charged the jury, in substance, that in order to return a verdict of guilty, it was not necessary that the jury find that the conspiracy was to violate all three such laws of the United States but, if they all agreed that the defendants had conspired to violate one of these three laws of the United States, then they could bring in a verdict of guilty. This was a correct statement of the law but how can this or any other Court determine which of the three offenses charged the jury determined the defendant Schutz to have been guilty of committing.

The entire record is devoted almost exclusively to proof of sales by Samuel, Hoffman and Brown. Eliminate this testimony from the record and there is nothing left on which to base a conviction.

Here we have but a single count in an indictment charging a conspiracy to violate three laws of the United States and this Court can not guess as to whether the jury found the defendants guilty of all three violations or as to which of the three the jury agreed upon.

It has been held, as announced in the cases cited on page 40 of the Government's Brief, that an indictment can charge a conspiracy to violate two or more laws of the United States and the judgment will be sufficient if the evidence establishes a conspiracy to violate one of such laws. However, this general rule is only applicable where pertinent and proper motions have not been made in the trial Court prior to the submission of the cause to the jury. In other words, where one of the alleged objects of the conspiracy was to violate a particular law and the proof did not support such charge, then, **if a defendant moves the Court to withdraw such charge from the jury and the motion is denied, the judgment can only be sustained if the evidence shows the conspiracy was to commit all of the crimes charged in the indictment.**

At the conclusion of the government's case appellant Schutz moved the Court to withdraw from the jury that portion of the indictment dealing with the conspiracy to violate the maximum price on the ground that the evidence was wholly insufficient to support or establish that portion of the charge. (R. 643-644.) The Court denied this motion.

In *U. S. v. Smith* (CCA-2), 112 Fed. (2d) 83, 86, the law in this regard is stated as follows:

> "Clearly there was sufficient proof for the jury to convict on the charge of conspiracy to commit the first two offenses. It is elementary that the jury needed to find a conspiracy to commit only one of the four offenses, in order to convict. But appellant was entitled to insist that if there was not sufficient proof of a conspiracy to commit any

one of the four offenses, the jury should be instructed to disregard that offense, and consider only a conspiracy to commit the other three. Appellant asked the court to take the issue of a conspiracy to commit the third office (transporting a woman for immoral purposes) away from the jury, and the court did so. Appellant neglected to request that the jury be similarly instructed to disregard the fourth offense (failing to register), but she now claims this part of the case should never have been submitted to the jury. Whether a conspiracy to commit that offense was shown under the circumstances here disclosed is a matter we need not now decide. Appellant's failure to request an instruction as to this offense was fatal."

In *United States v. Groves* (CCA-2), 122 Fed. (2d) 87, certiorari denied 314 U. S. 670, the Court reversed a conviction against one of the alleged co-conspirators and in doing so rendered the following decision:

"The case against Groves, however, stands on an entirely different footing. There was a general showing of his blood and business relationship with Wallace Groves and of his co-operation with Wallace Groves and Warriner in setting up the corporations which were later used for criminal purposes. In addition, there is more direct evidence of his participation in the Devendorf stock deal, in that some of his corporations took some of Devendorf's stock at Wallace Groves' request, and resold it for him to G.I.C. But there was no further evidence at all of his connection with the procurement of the two fraudulent commissions, and under the circumstances we feel that a jury

> would not be justified in finding that he participated in either of them. But if it could not find that he participated in both, his conviction must be reversed; for it was allowed, over objection, to consider together his guilt in respect of each of the three frauds alleged, and hence each must be proven. United States v. Smith, 2 Cir., 112 F. (2d) 83. See United States v. Koch, 2 Cir., 113 F. (2d) 982, 984."

In the instant case appellant Schutz fully protected his rights. The Court submitted the entire charges contained in the indictment to the jury which returned a general verdict of guilty. No one can say what prompted this action of the jurors or whether they did not proceed solely on the theory that Schutz was involved in a conspiracy to sell liquor above the ceiling price. As the evidence relating to this portion of the indictment consumes about ninety percent of the government's case, the prejudicial effect of submitting this phase of the matter to the jury should be manifest.

THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE LAW OF CIRCUMSTANTIAL EVIDENCE.

In our opening brief, page 123, we argued at length the error in the Court's instruction as to circumstantial evidence. This was a matter vital to appellant Schutz and he was entitled to have the jury correctly instructed in such regard. It must be remembered that none of the purchasers of the liquor dealt with Schutz at all and both the conspiracy and Schutz'

connection therewith had to be established by circumstantial evidence.

The government devotes but a paragraph to this erroneous instruction and comments on our argument as follows:

> "This argument is a study in hairsplitting semantics. A 'rational conclusion' can have no other meaning for the jury than the result of a 'reasonable hypothesis'. This is like defining the proper destination as one which is led to by the correct path, or the correct path as one which leads to the proper destination. The words are in either example two sides of the same shield. The instruction surely passes the ultimate test of its common sense meaning to the jury."

The inability of the attorneys for the government to distinguish between a "rational conclusion" and a "reasonable hypothesis" is regrettable but can not change the law. If our argument "is a study in hairsplitting semantics", then we are not alone in such hairsplitting, because that is exactly what this Court did in *Paddock v. United States,* 79 F. (2d) 872.

CONCLUSION.

The trial of the case as to Murray Schutz was replete with error. Not only was the evidence wholly insufficient to support the charge contained in the indictment, but his guilt or innocence was allowed to be passed on by the jury without the giving of proper instructions for the determination of this question

and under erroneous instructions of the Court and upon incompetent evidence admitted over Schutz' objection. The judgment as to Murray Schutz should be reversed.

Dated, San Francisco,
August 8, 1947.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Appellant,
Murray Schutz.

(Appendix Follows.)

Appendix.

Appendix

GENERAL MAXIMUM PRICE REGULATION.

This was the first regulation and was issued on April 28, 1942 and filed in the Federal Register on April 30, 1942. Pertinent provisions of this Regulation are as follows:

> "§ 1499.2. *Maximum Prices for Commodities and Services. General Provisions.* Except as otherwise provided in this Regulation the sellers' maximum price for any commodity or service shall be:
>
> (a) The highest price charged by the seller during March, 1942:
>
> (1) For the same commodity or service: or
>
> (2) If no charge was made for the same commodity or service, for the similar commodity or service, most nearly like it; or
>
> (b) If the sellers' maximum price cannot be determined under paragraph (a), the highest price charged during March, 1942, by the most 'closely competitive seller of the same class':
>
> (1) For the same commodity or service; or
>
> (2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it."

MAXIMUM PRICE REGULATION 193.

On August 1, 1942, *Maximum Price Regulation 193* (7 Fed. Reg. 6006) was issued. The pertinent provisions of this Regulation are as follows:

"§ 1420.1 *Maximum prices for domestic distilled spirits.* On and after August 5, 1942, regardless of any contract, agreement, lease or other obligation, no person shall sell or deliver domestic distilled spirits and no person in the course of trade or business shall buy or receive domestic distilled spirits at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as § 1420.13; and no person shall agree, offer, solicit, or attempt to do any of the foregoing.

§ 1420.13 *Appendix A: Maximum prices for domestic distilled spirits—(a) Determination of maximum prices generally.* The seller's maximum price for domestic distilled spirits shall be the seller's maximum price established under § 1499.2 (a) of the General Maximum Price Regulation, plus the following additions:

(1) *Manufacturers may add:* * * *

(2) *Sellers, other than manufacturers, may add:* * * *

(b) *Determination of maximum prices by reference to maximum prices of most closely competitive seller.* If the seller's maximum price for the domestic distilled spirits to be priced cannot be determined under paragraph (a) of this section, the seller's maximum price for such domestic distilled spirits shall be the maximum price established under paragraph (a) of this section for the most closely competitive seller of the same class for such domestic distilled spirits or for the similar commodity most nearly like it (as such term is defined in § 1499.2 of the General Maximum Price Regulation) for sales to a purchaser of the same class."

MAXIMUM PRICE REGULATION 445.

On August 9, 1943 *Maximum Price Regulation 445* (8 Fed. Reg. 11161) was issued. Pertinent provisions are as follows:

> "*Article V—Maximum prices for sales of packaged distilled spirits and packaged wine by wholesalers, retailers, monopoly states, and primary distributing agents.*
>
> SEC. 5.1 *Purposes of Article V*—(a) *Generally.* Article V establishes maximum prices for sales of packaged (but not bulk) distilled spirits and wine by the following persons:
>
> (1) Wholesalers, as defined in Section 7.12; (2) Retailers, as defined in Section 7.12; (3) Monopoly states, as defined in section 7.12 and (4) Primary distributing agents, as defined in section 7.12.
>
> * * * * * * *
>
> (c) *Prior regulations, orders and interpretations superseded.* Except as otherwise provided in this regulation, Article V supersedes all other maximum price regulations, orders and interpretations issued by the Office of Price Administration before August 14, 1943, with respect to sales of packaged imported and domestic distilled spirits or wine by any wholesaler, retailer, monopoly state or primary distributing agent, including the applicable provisions of the following:
>
> (1) The General Maximum Price Regulation;
>
> (2) Maximum Price Regulation No. 193, as amended;
>
> (3) Orders Nos. 1 through 5 inclusive under Maximum Price Regulation No. 193;

(4) Article II of Revised Supplementary Regulation No. 14;

(5) Section 2.3 (b) of § 1499.26 of Revised Supplementary Regulation No. 1;

Provided, That such maximum price regulations, orders and interpretations shall remain in effect with respect to a particular sale of packaged distilled spirits or wine by any such person until provisions of this Article become applicable thereto.

Sec. 5.3 *Determination of 'net cost' used in figuring maximum prices for wholesalers, retailers and monopoly states—*

(Here follows the cost-plus-15% formula.)

Sec. 5.10 Dates on which this article shall apply. This Article, except as otherwise provided, shall apply to all sales or offers to sell of packaged imported or domestic distilled spirits or wine made by a wholesaler, retailer, monopoly state, or primary distributing agent on or after August 31, 1943; * * *"